

**ARKANSAS COURT OF APPEALS**

DIVISION III

No. CACR 11-1275

TERRY DUANE NUTT

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

**Opinion Delivered** June 20, 2012APPEAL FROM THE PULASKI  
COUNTY CIRCUIT COURT,  
FIFTH DIVISION  
[NO. CR-10-4285]HONORABLE WENDELL GRIFFEN,  
JUDGE

AFFIRMED

**JOHN B. ROBBINS, Judge**

Appellant Terry Duane Nutt entered a negotiated plea of guilty to failure to register as a sex offender on March 29, 2011. On April 4, 2011, the trial court entered a judgment placing Mr. Nutt on six years' probation for that offense. Mr. Nutt's written conditions of probation required him to report to his probation officer as provided and to pay a \$20 monthly supervision fee.

On May 18, 2011, the State filed a petition to revoke Mr. Nutt's probation, alleging that he violated his conditions by failing to report to his probation officer and failing to pay supervision fees. After a hearing, the trial court found that Mr. Nutt violated his conditions by inexcusably failing to report to his probation officer since his initial intake on March 29, 2011. The trial court revoked Mr. Nutt's probation and sentenced him to eight years in prison followed by a two-year suspended imposition of sentence. Mr. Nutt now appeals

from his revocation, arguing that the trial court erred in finding that he inexcusably failed to comply with the terms of his probation. We affirm.

To revoke a probation or suspension, the trial court must find by a preponderance of the evidence that the defendant inexcusably violated a condition of that probation or suspension. *Foster v. State*, 104 Ark. App. 108, 289 S.W.3d 476 (2008). The trial court's findings will be upheld unless they are clearly against the preponderance of the evidence. *Costes v. State*, 103 Ark. App. 171, 287 S.W.3d 639 (2008). Because the determination of a preponderance of the evidence turns on questions of credibility and the weight to be given testimony, we defer to the trial court's superior position. *Johnson v. State*, 2011 Ark. App. 718.

Mr. Nutt's probation officer, William Elamin, testified for the State at the revocation hearing. Mr. Elamin testified that Mr. Nutt violated the terms of his probation by failing to report to the probation office. According to Mr. Elamin, he has not seen or heard from Mr. Nutt since Mr. Nutt pleaded guilty on March 29, 2011. Mr. Elamin sent Mr. Nutt a letter on April 6, 2011, informing him that he had failed to report or pay supervision fees, but Mr. Nutt failed to respond to the letter.

On cross-examination, Mr. Elamin testified that it was not possible that he may have seen or talked to Mr. Nutt but did not remember it. Mr. Elamin said that when a probationer contacts him, he always makes a notation and places it in the probationer's file. There were no such notations in Mr. Nutt's file.

Mr. Nutt testified that three weeks after he was placed on probation his apartment burned down. He said that after the fire he moved into his uncle's house, and that he registered as a sex offender under his new address. Mr. Nutt acknowledged that he was told to report to Mr. Elamin on April 26, 2011. Mr. Nutt testified that after his apartment burned down he called Mr. Elamin and informed him that he could not make his scheduled appointment. According to Mr. Nutt, Mr. Elamin told him not to worry about the \$20 supervision fee but said that he needed Mr. Nutt to report. Mr. Nutt testified that he did report to Mr. Elamin the week following his scheduled appointment date. Mr. Nutt testified that he has reported to Mr. Elamin at the probation office twice since being placed on probation, and he did not know why Mr. Elamin said that he never reported.

Mr. Nutt's sole argument for reversal is that the trial court's finding that he inexcusably violated the terms of his probation was clearly against the preponderance of the evidence. Mr. Nutt asserts that while the trial court specifically found his probation officer to be credible, the trial court did not comment on the veracity of Mr. Nutt's testimony that his apartment burned down. Mr. Nutt submits that if he lost all of his belongings in a fire and had to find a new home and comply with his sex-offender-registry requirements, there was certainly room to find his missed report date excusable. Mr. Nutt further contends that there was a failure of proof because his probation officer never testified that he had given Mr. Nutt a specific date on which to report.

We hold that the trial court's finding that Mr. Nutt inexcusably failed to report to his probation officer was not clearly against the preponderance of the evidence. While appellant's probation officer, Mr. Elamin, did not testify as to a specific reporting date, he did testify that he sent Mr. Nutt a letter on April 6, 2011, advising him that he had failed to report; that Mr. Nutt did not respond to the letter or communicate in any way with the probation office; and that Mr. Nutt violated his conditions by failing to report. Moreover, Mr. Nutt himself acknowledged in his testimony that he was told to report to Mr. Elamin on April 26, 2011.

While Mr. Nutt testified that his apartment burned down, the trial court was not required to believe his testimony, particularly because he was the person most interested in the outcome of the proceedings. *See Rhoades v. State*, 2010 Ark. App. 730, \_\_ S.W.3d \_\_. Moreover, even if Mr. Nutt's apartment did burn in April 2011 as he claimed, his probation officer testified that Mr. Nutt failed to report or contact him in any way between March 29, 2011, and the time the petition to revoke was filed on May 18, 2011. The trial court specifically credited the probation officer's testimony, and we are bound by that determination. The trial court committed no error in concluding that Mr. Nutt's failure to comply with his reporting requirements was inexcusable.

Affirmed.

VAUGHT, C.J., and ABRAMSON, J., agree.